

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BCD FARMS, INC.,

Plaintiff,

vs.

CERTIFIED ANGUS BEEF, LLC,
ANGUS PRODUCTIONS, INC., and
ANGUS JOURNAL,

Defendants.

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MEMORANDUM AND ORDER

Before the court is the defendants' motion to dismiss pursuant to Fed. R. Civ. P. 9(b) and 12 (b)(6) (filing no. 6). Plaintiff, BCD Farms, Inc., has responded, opposing the motion and, in the alternative, requesting the court leave to file an amended complaint. The court, having considered the submissions of the parties, determines that plaintiff should be granted leave to file an amended complaint and that the defendants' motion to dismiss should be denied without prejudice to reassertion within the appropriate time after the filing of an amended complaint.

The court reaches this determination because it finds that the plaintiff's complaint does not meet the requirements of Fed. R. Civ. P. 9(b). Plaintiff's claims against the defendants are based on fraud; thus, pursuant to Rule 9(b), plaintiff must aver the "circumstances" constituting the fraud with particularity. See Commercial Property Inv., Inc. v. Quality Inns Int'l, Inc., 61 F.3d 639 (8th Cir. 1995). The Eighth Circuit has found that the "circumstances," under Rule 9(b), include matters such as "the time, place and contents of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby." Id. After a careful review of the plaintiff's complaint, the court determines that it lacks the sufficient "circumstances"

to support any claim of fraud as mandated by Rule 9(b). Therefore, in the interest of justice, in the interest of judicial economy, and pursuant to Fed. R. Civ. P. 15, the court will allow the plaintiff an opportunity to file its amended complaint with the pleading requirements of Fed. R. Civ. P. 9(b). See Fed. R. Civ. P. 15(a) (leave to amend shall be freely given when justice so requires). Accordingly, the plaintiff is granted leave to amend its complaint.

IT IS HEREBY ORDERED:

1. That the plaintiff is granted 30 days from the date of this order to file its amended complaint; and
2. That the defendants' motion to dismiss (filing no. 6) is denied without prejudice to reassertion within appropriate time after the filing of plaintiff's amended complaint.

DATED this 28th day of July, 2005.

BY THE COURT:

s/ Joseph F. Bataillon
JOSEPH F. BATAILLON
United States District Judge